IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT.

No. 15911.

BILL WILLIAM PROHOROFF,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S OPENING BRIEF.

J. B. Tietz,
410 Douglas Building,
257 S. Spring Street,
Los Angeles 12, California,
Attorney for Appellant.

E. L. Mendenhall, Inc., 1108 Oak Street, Kansas City 6, Mo., HArrison 1-3030

INDEX

Jurisdiction 1

Statement of the Case 2

The Facts 2

Questions Presented and How Raised 4

Specification of Errors 5

Summary of Argument 5

Argument 7

I. Appellant Should Not Be Barred from His Defenses Because He Did Not Exhaust His Administrative Remedies 7

II. The Denial of the Conscientious Objector Status Was Without Basis in Fact 14

III. Appellee Failed to Establish Geographical Jurisdiction in Local Board 71 20

Conclusion 25

Appendix A—

Index of Exhibits in Record 26

Table of Cases and Authorities Cited

CASES

Anderson v. *U. S.*, 66 S. Ct. 483 20

Chernekoff v. *U. S.*, 219 F.2d 721 at 724 9

Cox v. *Wedemeyer*, 192 F.2d 920 11

Doty v. *U. S.*, 218 F.2d 93, 96 21

Davidson v. *U. S.*, 218 F.2d 809 9

Dickinson v. *U. S.*, 74 S. Ct. 152, 158 ..... 6, 15, 16, 17, 19

Estep v. *U. S.*, 66 S. Ct. 423 21

Evans v. *U. S.*, 252 F.2d 509 ..... 6, 12

Ex parte Fabiani, 105 F. Supp. 147 12
Franks v. *U. S.*, 9th Cir., 216 F.2d 266, 269 19
Hagaman v. *U. S.*, 3d Cir., 213 F.2d 86 19
Jessen v. *U. S.*, 10th Cir., 1954, 212 F.2d 897, 900 ..... 18, 19
Jewell v. *U. S.*, 6th Cir., 1953, 208 F.2d 770, 771-772 ..... 18, 19
Johnston v. *U. S.*, 76 S. Ct. 739 20
Kaline v. *U. S.*, 235 F.2d 54 at 58 9
Mason v. *U. S.*, 218 F.2d 375 9
Pine v. *U. S.*, 4th Cir., 1954, 212 F.2d 93, 96 18
Schuman v. *U. S.*, 9th Cir., 1953, 208 F.2d 801, 802, 804-05 18
Shepherd v. *U. S.*, 9th Cir., 217 F.2d 942 19
Taffs v. *U. S.*, 8th Cir., 1953, 208 F.2d 839, 331-332 18
Uffelman v. *U. S.*, 230 F.2d 297, 301 9
U. S. v. *Carleton*, (SD Ohio) Crim. No. 6030 13
U. S. v. *Close*, 7th Cir., 1954 ..... 18, 19
U. S. v. *Hartman*, 2d Cir., 1954, 209 F.2d 366, 368, 369-370 18
U. S. v. *Izumihara*, D. Hawaii, 120 F. Supp. 36 19
U. S. v. *Kemler*, 44 F. Supp. 649 22
U. S. v. *Peebles*, 220 F.2d 114, 119 19
U. S. v. *Simmons*, 7th Cir., 1954, 213 F.2d 901 18
U. S. v. *Underwood*, SD W.Va., 4/27/56, No. 754 12
U. S. v. *Williams*, No. 8917 Criminal, D. Conn., 1954 19
U. S. v. *Wilson*, 7th Cir., 1954, 215 F.2d 443, 446 18
Weaver v. *U. S.*, 8th Cir., 1954, 210 F.2d 815, 822-823 ..... 17, 19
Witmer v. *U. S.*, 75 S. Ct. 392 (1955) 15, 18

CODES, STATUTES, ETC.

California Code of Civil Procedure, Sec. 1945 25
32 C.F.R., Section 1604.41 ..... 9, 10
32 C.F.R., Section 1604.51 22

32 C.F.R., Section 1604.54 23
32 C.F.R., Section 1612.12 20
32 C.F.R., Section 1622.11 15
32 C.F.R., Section 1622.14 14
Federal Rules of Criminal Procedure, Rule 27 (a) (1) and (2) 2
U.M.T. & S. Act, Sec. 6(j) 11
United States Code, Title 18, Section 3231 1
50 U.S.C. App., § 456(j), 65 Stat. 75, 83, 86 14
U.S.C., Title 50, App., Sec. 10 (b) (3) 23

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT.

No. 15911.

BILL WILLIAM PROHOROFF,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S OPENING BRIEF.

JURISDICTION.

This is an appeal from a judgment rendered and entered by the United States District Court for the Southern District of California, Northern Division. The appellant was sentenced to custody of the Attorney General for a period of six months. (R. 5-6)* Title 18, Section 3231, United States Code, confers jurisdiction in the district court over the prosecution of this case. This Court has juris-

---

*R refers to the printed Transcript of Record.

diction of this appeal under Rule 27 (a) (1) and (2) of the Federal Rules of Criminal Procedure. The notice of appeal was filed in the time and manner required by law. (R 8)

STATEMENT OF THE CASE.

The indictment charged appellant with violation of the Universal Military Training and Service Act. (R 3-4) It was alleged that he became a registrant of Local Board No. 71 of the Selective Service System in the County of Fresno, State of California, and that having theretofore been duly classified in Class I-A, did knowingly refuse and fail to comply with the order of his said Local Board No. 71 to report for induction. (R 3-4)

Appellant pleaded not guilty, waived jury trial and was tried on December 30, 1957. (R 9) A written motion for judgment of acquittal was filed. (R 4-5) The motion was denied and the appellant was found guilty and sentenced on January 20, 1958. (R 39) The motion contains all of the grounds that the Appellant relies upon for reversal of the judgment in this case. (R 50)

THE FACTS.

Appellant was registered with the Selective Service System on December 30, 1952 (Ex 1, 2); this registration and all subsequent acts were the result of repeated effort by the F.B.I. (Ex 115, R 43)*

Ex refers to the Government's exhibit, the selective service file of appellant. The pagination is at the bottom of each sheet of the exhibit, circled.

He was sent the standard Classification Questionnaire (SSS Form No. 100) on February 2, 1953. He returned this 8 page form with only his signature inserted (Ex 7-14) accompanying it with a letter stating "When I talked to your detectives in Fresno I explained our whole religion to them." (Ex 16) At the time of his sentencing he informed the Court that he considered it wrong to perform any part of the conscription process but that, at the urging and on the advice of the F.B.I. agent he cooperated as a law-abiding citizen. (R 43)

So, with the F.B.I. agent bringing him in again and again for questioning and explaining, at every step, he not only registered but signed and returned the Classification Questionnaire and eventually the Special Form for Conscientious Objectors (SSS Form No. 150). (R 46, Exs 64-67)

In this Special Form he claimed that he should be exempted from *military* service of any kind because he had opposition to participation in warfare on religious grounds. (Ex 64) He showed that he believed in a Supreme Being; that he had had religious training (Ex 64); that he was raised in the Molokan faith and believed in it (Ex 65, No. 3); that he was a complete pacifist (Ex 65, No. 5) and that he had given public expression of his beliefs (Ex 65, No. 7). He showed that both his parents were Molokans (Ex 66, No. 5) and that his church was one of the so-called historic peace churches (Ex 66, No. 2 (e)); that he never had been connected with any military organization (Ex 66, No. 3) and he gave three references pertaining to his sincerity. (Ex 67)

Thereupon the Local Board without any evidence contradicting any of his showings reclassified him in the same Class I-A (available for any type of military service). (Ex 15)

Thereafter he was ordered to report for induction, and, upon his failure to do so was indicted.

QUESTIONS PRESENTED AND HOW RAISED.

I

The threshold question of availability of defenses is present because appellant never took an administrative appeal.

The question here presented is whether the rule of exhaustion of administrative remedies should be relaxed due to the presence of mitigating facts. This question was raised when the trial judge stated that he had "no power" to review the propriety of the action of the local board because of the defendant's failure to appeal during the administrative process. (R 36)

II

Appellant presented written evidence to the local board which, if true, showed that he met all the statutory requirements for a conscientious objector classification. Without any recorded adverse evidence the board rejected his *prima facie* case.

The question here presented is whether his file shows anything that constituted a basis in fact for rejecting his evidence. This question was raised by the motion (R 4)

and by the trial court's refusal to consider this ground. (R 36)

III

Appellant presented evidence that there were four selective service local boards officed together in Fresno. (R 12, 23) Appellee offered evidence to show that Local Board No. 71 had geographical jurisdiction over the area where appellant resided on the date of his registration.

The question presented here is whether appellee's evidence was admissible over objection (R 25, 26, 32, 33), and did it afford a basis for the trial court to take judicial knowledge that this local board had geographical jurisdiction.

SPECIFICATION OF ERRORS.

I

The district court erred in failing to grant the motion for judgment of acquittal.

II

The district court erred in convicting the appellant and entering a judgment of guilty against him.

SUMMARY OF ARGUMENT.

I

The court-made rule requiring that a defendant exhaust his administrative remedies should be relaxed when a proper showing is made to excuse such failure and when

the defendant has a meritorious defense that would gain him acquittal, if available.

The facts in this case bring appellant within the position taken by this Court in *Evans* v. *United States,* 252 F. 2d 509.

II

Appellant submitted facts *prima facie* entitling him to a conscientious objector classification. There was not a scintilla of evidence placed in the file contradicting his certificated evidence.

The only possible basis the board could have, outside of the "speculation and suspicion" condemned by the Supreme Court in *Dickinson* v. *United States,* 74 S. Ct. 152, 158, is the board's repeated experience with him as a delinquent. Annoying as this experience may have been to the board, it gave no basis for a belief that he was a sham or insincere; in fact, everything connected with his recalcitrance is consistent with sincerity and truthfulness; it even compels a belief in it. Finally, there never was a finding of insincerity. The only adverse recordation was that he was an "evader", a term consistent with religious sincerity, and this appellation was applied to him only long after he had failed to report for induction. (Ex 117)

III

Appellee attempted to show that Local Board No. 71 had geographical jurisdiction over appellant, in the following ways:

1. By stipulation. Appellant refused. (R 14)

2. By witness Hathaway. This attempt foundered when it became evident he had made the map from a description of boundaries dated after the date of appellant's registration. (R 20-21)

3. By witness Ford. The Court accepted her testimony as a basis for using the doctrine of judicial notice. Appellant had objected to her testimony on the grounds of no foundation, hearsay and not relevant. (R 25, 26, 32 33)

ARGUMENT.

I.

Appellant Should Not Be Barred from His Defenses Because He Did Not Exhaust His Administrative Remedies.

The undisputed evidence concerning appellant's conduct during his selective service processing is susceptible of two opposite views:

1. He was a slacker who deserves no sympathy or leniency from a court;

2. He was a sincere religious objector whose consistent conduct of opposition to military service entitles him to his day in court, to have his defenses weighed.

Appellant urges that the Court adopt the second view. The relevant facts are to be found in the selective service file (the Exhibit) and in appellant's statement to the trial court. (R 43) Read together the appellant's motivation is obviously not a desire to obstruct the administrative process or to mislead the draft board or the F.B.I.; he definitely believed the Molokans were exempt from registering for

military service. (R 43) However, when the F.B.I. agent informed him that this wasn't so (R 44, top) he replied "Well, if that's the case, Mr. Groves then I feel I'm not taking part in any kind of military service if I register," and the agent said "That's right." (R 44, bottom)

This above-stated explanation is consistent with all his conduct, prior and subsequent. Any other explanation is unnecessarily skeptical and tortured.

The record further shows that he relied on Mr. Groves (R 47) and that the agent never mentioned anything to him about taking an administrative appeal if the Local Board did not give him the conscientious objector classification. (R 46) The question presented here is was there a duty upon or assumed by the agent or any government official to do more for this registrant than for the ordinary one? The ordinary one gets a post-card notice.

Appellant will argue that the factual situation here presented should persuade the Court to hold that having gone as far as he did the F.B.I. agent should also have informed the registrant about the administrative appeal requirement. This is so because it was obvious to anyone as familiar with selective service religious objectors as an F.B.I. agent assigned to this work, that if the local board rejected the registrant's claim, the registrant was an inevitable candidate for federal prison.

Appellant will also argue that he had reason to repose confidence in the F.B.I. agent, the official who obviously had power to arrest and confine him, the official who was friendly, informative and who assumed the role of counsellor. The F.B.I. agent set the stage for appellant

to rely on him. Appellant had no other advisor. Nor were there official Advisers to Registrants. These points will be gone into again hereinafter in more detail to the conclusion that if the agent had not assumed the role of adviser appellant would undoubtedly have consulted his father's attorney as his father suggested. (R 47) That because of the above he relied and continued to rely on the F.B.I. agent. (R 47)

A. In the first place, the Selective Service regulations themselves recognize that registrants are not the kind of persons who have a familiarity with administrative or legal process or who are accustomed to seek legal advice, that is, if they have to pay a fee for it. Section 1604.41 (32 C.F.R.) provides for official Advisors to Registrants. (See below) Although the record in this case contains no mention of this advisor official, this Court knows that the local boards uniformly ignored the provision for such officials and the further provision that their names and addresses be posted.

In the following decisions of this Court this fact is clear, on the pages hereafter noted: *Chernekoff* v. *United States,* 219 F. 2d 721 at 724; *Kaline* v. *United States,* 235 F. 2d 54 at 58; *Mason* v. *United States,* 218 F. 2d 375 (see opinion denying Petition for Rehearing); *Uffelman* v. *United States,* 230 F. 2d 297, 301.

In *Davidson* v. *United States,* 218 F. 2d 809, the Record, at page 42, gives the testimony of Col. Hartwell, assistant deputy director of Selective Service for the State of California, on November 18, 1953:

> "The Witness: We have—while we don't in this state have that which under Section 1604.41 appears

to be discretionary, as to the appointment of advisors to registrants, we do not have them set up as such. We call them registrars. But they perform the same duties as the advisor to a registrant.

Q. (By Mr. Tietz) In other words, you would say that in the State of California there is no official designated as an advisor to a registrant, as provided in Section 1604.41?

A. Under my jurisdiction, I don't think that we have any here.

Q. And at no time during the processing of this defendant, which started in 1948, did Local Board No. 89 have such an official?

A. As designated."

Further, after this Court and others had a considerable number of cases where the failure of the boards to comply with this provision was made an issue the regulation was amended to change the provision from mandatory ("shall be appointed") to discretionary ("may") on 15 February 1955.

"Advisors to Registrants.

1604.41 Appointment and Duties.—Advisors to registrants may be appointed by the Director of Selective Service upon recommendation of the State Director of Selective Service to advise and assist registrants in the preparation of questionnaires and other selective service forms and to advise registrants on other matters relating to their liabilities under the selective service law. Every person so appointed should be at least 30 years of age. The names and addresses of advisors to registrants within the local board area shall be conspicuously posted in the local board office."

Appellant's point does not depend upon whether the provision was mandatory or not; he is showing only that the need for advisors has always been recognized by the Selective Service System itself and that the Court may take judicial notice that the California boards had none.

B. The intent of Congress was to raise an army and to get conscientious objectors into civilian work that contributes to the national health, welfare and interest. (U.M.T. & S. Act, Sec. 6(j)). To allow registrants needlessly to head into prison is to subvert the Act. No one meeting appellant ever doubted his sincerity (except possibly the prosecutor) or his firm intent to refuse military service. For these reasons and because of the advisory conduct and relationship of the F.B.I. agent to this registrant it therefore became incumbent on the officials to inform him that an administrative appeal was a required step, once the local board rejected his claim and evidence. Under the circumstances a post card notice with fine print referring to 10 days to appeal is not enough of a discharge of this obligation. His draft history showed that he had the fixed idea that he would do only what Mr. Groves told him was required of him. (R. 47) It was certainly morally wrong to let him head straight for prison, without a specific warning concerning appellate necessity. The Court is asked to declare that it was also legally wrong.

C. This Court, and others, have spoken on the type of judicial consideration that is to be accorded registrants who have not precisely obeyed procedural requirements.

Cox v. *Wedemeyer,* 192 F. 2d 920, where this Court pointed out:

"* * * None of them (is) represented by counsel." (923) and

Ex parte Fabiani, 105 F. Supp. 147, where Judge McGranery declared:

> "The different objective to be achieved by the new Act behooves us to employ a more liberal standard of judicial review, so as better to protect the rights of the individual. Should—which God forbid—world tensions increase greatly or should general war come, then the judicial arm can once again cut to the barest minimum its supervision of the operations of the draft." (146-147) and

United States v. *Underwood,* SD W.Va., 4/27/56, No. 754 where Judge Moore said:

> "We know from the evidence that he wanted to make the claim and we don't find that the clerk told him how to make it. He and his father went to the clerk and there is no record that the clerk told them to apply to the board."

D. Appellant does not claim that the F.B.I. agent consciously misled or lulled him into security. He does claim that this was the effect. He believes that the failure to warn him of the necessity for an appeal should be weighed in favor of relaxing the rule. As mentioned hereinabove appellant relied on the agent for guidance. (R. 47) This Court, in *Evans* v. *United States,* 252 F. 2d 509, indicates that a case might arise where the Court would be inclined to relax the rule; that the condition required for such a relaxing might be that the registrant claims he was not aware of his right to appeal. Appellant received the

standard post-card notice, but he asserts that his continued relationship with the F.B.I. agent and his expressed reliance on the agent's advice justified him in believing in general that the agent would not let him become needlessly entrapped; and specifically that the agent would inform him of a necessity such as an administrative appeal just as the agent did inform him of the necessity for doing the many other things the agent again and again brought to his attention. (R. 47)

Appellant believes that when the F.B.I. undertakes to advise a selective service registrant on procedural matters it should be required to advise him more fully than was done here.

A somewhat analogous situation was decided by Judge Underwood in *United States* v. *Carleton,* (SD Ohio) Crim. No. 6030 on October 24, 1951. There, the agent procured a waiver from the registrant, wherein he withdrew his claim for a conscientious objector classification and relied solely on his claim for a minister's classification, as one of Jehovah's witnesses. In finding the defendant not guilty Judge Underwood concluded:

> "The waiver which defendant signed was not effective because he did not fully understand the consequences." (Slip op. p. 3)

Some features of appellant's case may be speculative or debatable but it is certain that he did not understand he had to ask the local board to send his file to the appeal board or else have his mouth shut from then on.

Appellant asks the Court to declare that when government officials are dealing with a registrant under circum-

stances like those of this case the postcard notice is not enough; that either the registrant should be specifically told of the necessity for an administrative appeal or that the rule requiring exhaustion of administrative remedies be relaxed.

II.

The Denial of the Conscientious Objector Status Was Without Basis in Fact.

Section 6(j) of the act (50 U.S.C. App., § 456(j), 65 Stat. 75, 83, 86) provides:

> "Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief, in this connection, means an individual's belief in a relation to a Supreme Being, involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code."

Section 1622.14 of the Selective Service Regulations (32 C.F.R., § 1622.14) provides:

> "Class I-O: *Conscientious objector available for civilian work contributing to the maintenance of the national health, safety, or interest.*
>
> —(a) In Class I-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and to be conscien-

tiously opposed to participation in both combatant and noncombatant training and service in the armed forces."

Section 1622.11 provides:

> "Class I-A-O: *Conscientious Objector Available for Noncombatant Military Service Only.*—(a) In Class I-A-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to combatant training and service in the armed forces."

The attitude of the Selective Service System and of the court below, concerning whether there was a basis in fact for the classification was grounded upon error. To begin with, it ignores the doctrine of *Dickinson* v. *United States,* 346 U.S. 389 (1953). That decision requires that the board, "* * * must find and record affirmative evidence that he has misrepresented his case * * *"—346 U.S., pp. 396-397, 399 (dissenting opinion). And it also ignores the doctrine of *Witmer* v. *United States,* 75 S.Ct. 392 (1955), wherein the yardstick of sincerity is made the law. Absent any finding recorded that questions it, the *Dickinson* doctrine controls.

Congress says that a man is a conscientious objector if he (1) believes in a Supreme Being, (2) conscientiously opposes participation in the armed forces by combatant or noncombatant service, and (3) bases such objection on religious training and belief. The appellant concededly believed in a Supreme Being. He opposed participation in the armed forces. He based those objections on his religious training and belief.

The evidence submitted by the appellant established at least *prima facie*[1] that he had sincere and deep-seated conscientious objections against participation in combatant and also noncombatant military service and that these objections were based on his "relation to a Supreme Being involving duties superior to those arising from any human relation." This material also showed that his belief was not in the least based on "political, sociological, or philosophical views, or a merely personal moral code"; that it was entirely based upon his religious training and belief as one of the Molokans. (Ex 66)

The Selective Service System raised no question [none is recorded] concerning the *veracity* of the petitioner. The question therefore is not one of fact, but is one of law; *Dickinson* v. *United States, supra.* The law and the facts in his file, at least *prima facie,* establish that petitioner is a conscientious objector opposed to combatant and noncombatant service.

In view of the fact that there is no contradictory relevant evidence in the file, disputing appellant's statements as to his conscientious objections, and there is no question of veracity presented, the problem to be determined here by this Court, appellant repeats, is one of law rather than one of fact. The question to be determined is: Was the decision (that the evidence did not

---

[1]The language of *Dickinson* is:

"But when the uncontroverted evidence supporting a registrant's claim places him *prima facie* within the statutory exemption, dismissal of the claim solely on the basis of suspicion and speculation is both contrary to the spirit of the Act and foreign to our concepts of justice.

"Reversed." [74 S. Ct. 152, 158].

prove appellant was a conscientious objector opposed to both [or either] combatant and noncombatant military service) arbitrary, capricious and without basis in fact?

The undisputed documentary evidence in the file showed that the appellant was conscientiously opposed to participation in combatant and noncombatant military service. This showing brought him squarely within the statute and the regulation providing for classification as a conscientious objector. This entitled him to exemption from combatant and noncombatant military training and service.

There is absolutely no evidence whatever in the draft board file that appellant was willing to do military service. All of his papers, and every document supplied by him, staunchly presented the contention that he was conscientiously opposed to participation in both combatant and noncombatant military service. Never, at any time, did the appellant suggest to the Selective Service System, or even imply, that he was willing to perform any military service. He, at all times, contended that he was unwilling to go into the armed forces and do anything as a part of the military machinery.

It has been held by many courts of appeal that the rule laid down in *Dickinson* v. *United States, supra,* (holding that if there is no contradiction of the documentary evidence showing exemption as a minister, there is no basis in fact for the classification) also applies in cases involving other claims.

Weaver v. *United States,* 8th Cir., 1954, 210 F.2d 815, 822-823;

Taffs v. *United States,* 8th Cir., 1953, 208 F.2d 839, 331-332;
United States v. *Hartman,* 2d Cir., 1954, 209 F.2d 366, 368, 369-370;
Pine v. *United States,* 4th Cir., 1954, 212 F.2d 93, 96;
Jewell v. *United States,* 6th Cir., 1953, 208 F.2d 770, 771-772;
Schuman v. *United States,* 9th Cir., 1953, 208 F.2d 801, 802, 804-05;
Jessen v. *United States,* 10th Cir., 1954, 212 F.2d 897, 900;
United States v. *Close,* 7th Cir., 1954, *supra;*
United States v. *Wilson,* 7th Cir., 1954, 215 F.2d 443, 446;
contra United States v. *Simmons,* 7th Cir., 1954, 213 F.2d 901.

Simmons was reversed by the Supreme Court on March 14, 1955, *Simmons* v. *United States,* 75 S.Ct. 397. The reversal was on other grounds, however and it remained for *Witmer,* 75 S.Ct. 392, to settle the point. In *Witmer,* it was held that the inconsistent statements and positions of the registrant, gave the Selective Service System a basis in fact for disbelieving his sincerity and denying his claim for a conscientious objector classification. The Court referred to the Department of Justice findings that Witmer had retreated from one deferred claim to another (for a total of three claimed statuses) and had made inconsistent statements, and had offered to contribute to the war effort [395].

Appellant Prohoroff's file cannot be fairly charged with containing any of the above flaws. He was entitled to at least a I-A-O conscientious objector classification.

That he might have turned it down, was no excuse for not giving it to him. See *Franks* v. *United States*, 9th Cir., 216 F.2d 266, 269.

In *Jessen* v. *United States,* 10th Cir., 1954, *supra,* 900, after quoting from *Dickinson, supra,* the Court said:

> "Here, the uncontroverted evidence supported the registrant's claim that he was opposed to participation in war in any form. There was a complete absence of any impeaching or contradictory evidence. It follows that the classification made by the State Appeal Board was a nullity and that Jessen violated no law in refusing to submit to induction."

A conscientious objector *believes,* and governs his professions and conduct accordingly. The relevant evidence is all on *one* side, Prohoroff's. His veracity was never questioned.

There must be an affirmative finding that his evidence lacked credibility. "It is hard to see how the board could have refused a deferment under the case of *Dickinson* v. *United States,* 346 U.S. 389, unless there was an affirmative finding that the evidence lacked credibility." *United States* v. *Williams,* No. 8917 Criminal, D. Conn., April 2, 1954, Judge J. Joseph Smith. And see *United States* v. *Peebles*, 7th Cir., 220 F.2d 114, 119, and cases cited. Also *Weaver* v. *United States, supra, Jewell* v. *United States, supra, Hagaman* v. *United States,* 3d Cir., 213 F.2d 86, *United States* v. *Izumihara,* D. Hawaii, 120 F.Supp. 36, *United States* v. *Close*, 7th Cir., *supra.*

This phase of Prohoroff's case is similar to a case decided by this Court in 1954. In *Shepherd* v. *United States*, 9th Cir., 217 F.2d 942, we read:

"However, this case differs in an important particular from the Hinkle case where we pointed out that there was no suggestion of any sham or fakery on the part of Hinkle whose beliefs and views were admittedly sincere and genuine. Here it is to be noted the Department's recommendation of a denial of exemption was based upon a disbelief in Shepherd's honesty and sincerity as well as upon the legal conclusions that he could not be a conscientious objector because of his belief in self defense and in theocratic war." [945]

To repeat, and conclude, no one has questioned Prohoroff's sincerity, or attempted to rebut his *prima facie* case.

III.

Appellee Failed to Establish Geographical Jurisdiction in Local Board 71.

The subject of geographical jurisdiction has always been given serious consideration in selective service prosecutions. *Anderson* v. *United States,* 66 S. Ct. 483; *Johnston* v. *United States*, 76 S. Ct. 739.

It is firmly established that an invalid order of a local board affords no basis for a conviction. It is a corollary that a local board must have initial geographical jurisdiction before it can issue a valid order. This is also the clear meaning of the selective service regulations:

1613.12 Instructions Concerning Completion of Registration Card.—(a) The registrar shall take extreme care that the place of residence of the registrant is correctly entered on line 2 of the Registration Card (SSS Form No. 1). The local board having jurisdiction

over the place of residence entered on line 2 of the Registration Card (SSS Form No. 1) shall always have jurisdiction over the registrant, unless otherwise directed by the Director of Selective Service. The registrar shall require the registrant to give sufficient information as to the location of the place of his residence to establish such place within the jurisdiction of a local board. The registrant shall not be permitted to give a place of residence outside of the several States of the United States, the District of Columbia, the Territory of Alaska, the Territory of Hawaii, Puerto Rico, the Virgin Islands, Guam, or the Canal Zone. In describing his place of residence, the registrant shall give the street number thereof, when used, and in every case he shall give the name of the town, township, village, or city, and the county and State in which it is located. No R. F. D. route number shall be sufficient unless it is supplemented by more particular information showing where the place of residence is located on the R. F. D. route. The registrant shall be permitted to determine what place he desires to give as his residence when he is not located in the same place all of the time. (32 C.F.R., Sec. 1613.12)

This is also the conclusion of the Eighth Circuit wherein the court declared "The local board of defendant's residence had jurisdiction." *Doty* v. *United States,* 218 F. 2d 93, 96.

This also seems to be the view of the Supreme Court, in *Estep* v. *United States,* 66 S. Ct. 423, wherein we read:

> "It is only orders 'within their respective jurisdictions' that are made final. It would seem, therefore, that if a Pennsylvania board ordered a citizen and resident of Oregon to report for induction, the defense

that it acted beyond its jurisdiction could be interposed * * *."

It also follows that it is an essential part of a prosecution to show said geographical jurisdiction, after the defendant presents evidence to preclude the application of the doctrines of official regularity and judicial notice. This was recognized by appellee when it accepted the trial court's invitation to reopen its case for such purpose. (R 14)

This point, as raised, is apparently one of first impression in a draft case, the only authority found, bearing on the subject, being *United States* v. *Kemler*, 44 F. Supp. 649, wherein the court held:

> (10) Further, in this connection, there is no sufficient allegation in the indictment that the defendant was within the jurisdiction of Selective Service Board Number 128, Revere, Suffolk County, Massachusetts. Certainly, it was essential that he should be, in order to commit the offense charged. If the defendant was not within the jurisdiction of this Board any report Dr. Musgrave might make would not be within his official function. (652)

The Selective Service regulations (32 C.F.R.) provide that the county shall be divided into local board areas:

> LOCAL BOARDS.
>
> 1604.51 Areas.—The State Director of Selective Service for each State shall divide his State into local board areas. Normally, no such area should have a population exceeding 100,000. There shall be at least one separate local board area in each county; provided, that an intercounty local board may be established for

an area not exceeding five counties within a State when the Director of Selective Service determines, after considering the public interest involved and the recommendation of the Governor, that the establishment of such local board area will result in a more efficient and economical operation.

1604.54 Jurisdiction.—The jurisdiction of each local board shall extend to all persons registered in, or subject to registration in, the area for which it was appointed. It shall have full authority to do and perform all acts within its jurisdiction authorized by the selective service law.

It is submitted that the Act itself (U.S.C., Title 50, App. Sec. 10 (b) (3)) completely clarifies the point appellant is relying on:

"Such local boards, or separate panels thereof each consisting of three or more members, shall, under rules and regulations prescribed by the President, have the power within the *respective* jurisdictions of such local boards to hear and determine * * *" (Italics supplied).

Appellant introduced evidence to show that there were four local boards officed together in the city of Fresno. (R 12) This precluded application of the doctrine of official regularity, and, as recognized by appellee (R 14) necessitated a showing that Local Board No. 71 was the board that had jurisdiction over appellant. Additionally, judicial notice that appellant's residence was in the area of Local Board No. 71 would have been permissible only if the county had one local board. This was recognized by the trial court. (R 14, 20) The judge therefore invited appellee to reopen its case and present evidence.

Appellee's first attempt (after an abortive effort to persuade appellant to stipulate away this defense, R 13), was to use Area Coordinator Hathaway. This attempt foundered when it became evident that the boundary map was made from a legal description attached to a letter from Col. Lyman dated 1953 and the undisputed evidence was that appellant had registered in 1952. (R 19) The Col. Lyman letter was part of Exhibit marked 2 for identification (R 20) and was withdrawn by the appellee at the close of all argument. (R 35)

Appellee's next attempt was to use Mrs. Ford, Group Coordinator for the Local Board Group. (R 22)

She testified that she was and had been in charge of the draft board office since 1948 (R 22); that the white typewritten sheet in Exhibit 2 was in the office during her entire period of service and that she made the large map from it in 1949. (R 25-26) Appellant objected to this evidence on the ground that there was insufficient foundation to show that it was official; that the white sheet didn't have even the rather limited authentication that had been furnished for the blue sheet in Exhibit 2; it had been shown that the blue sheet was the work of a Selective Service official, Colonel Lyman. (R 16)

The testimony of appellant's witness Ford showed that the white sheet description had nothing on it to show it was the official product of state headquarters other than the "*belief*" of the witness that it came from the state office. (R 24)

Without these documents, admitted into evidence later (R 35), there concededly would have been no basis what-

ever for the trial court to conclude that Local Board 71 had jurisdiction over appellant.

Appellant submits that his objection to the admission of these documents should have been sustained. These documents were not ancient (in California a document must be 30 years old to be presumed to be genuine: California Code of Civil Procedure, Sec. 1945); nor were they of general notoriety or interest, nor had defendant at any time admitted their execution, nor had they ever been in his possession. All these documents were concededly recently manufactured and more adequate foundation concerning their correctness could easily have been furnished by the State Director of Selective Service. The fact that the sheet of paper bore a heading "Local Board No. 71" and a territorial description does not sufficiently indicate it was the boundary officially determined by the State Director. Nor does the additional evidence (R 32) that it "came from state headquarters in 1948" supply the deficiency. Surely some kind of authentication should have been attached to it or certified on it or testified to by a state headquarters official. The document describing boundaries could so easily have been a tentative draft and even if there had been testimony that it was a final draft there should have been evidence to show that it had been compared with the state director's official records or his master copy.

CONCLUSION.

The judgment of the Court below should be reversed.

Respectfully submitted,

J. B. Tietz,

Attorney for Appellant.

APPENDIX A.

Index of Exhibits in Record

	Identified	Offered	Received
Plaintiff's Exhibit No. 1 ..... (Selective Service file of Prohoroff)	10	10	10
Plaintiff's Exhibit No. 2 ..... (Boundary description)	20, 24-25	34	35
Plaintiff's Exhibit No. 3 ..... (Large map)	28	34	35
Plaintiff's Exhibit No. 4 ..... (Small map)	28	34	35